STATE OF MICHIGAN

IN THE SUPREME COURT

HAROLD HUNTER JR.,
Plaintiff-Appellant,

-v-

DAVID SISCO and
AUTO CLUB INSURANCE ASSOCIATION,
Defendants,
and

CITY OF FLINT,
Defendant-Appellee.
_____/

Supreme Court No 147335
Court of Appeals No 306018
Genesee Cir Ct No 10-094081-NI

PLAINTIFF-APPELLANT'S

REPLY BRIEF

* * * ORAL ARGUMENT REQUESTED * * *

Submitted by:

Allan Falk (P13278)
Allan Falk, P.C.
Appellate counsel for Plaintiff-Appellee
2010 Cimarron Dr.
Okemos, MI 48864-3908
(517) 381-8449

Cyril V. Weiner (P26914)
Nicholas M. Marchenia (P73169)
Law Office of Cy Weiner, P.L.C.
Counsel for Plaintiff-Appellee
4000 Town Center, Suite 550
Southfield, MI 48075
(248) 351-2200

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Law Office of Cy Weiner, P.L.C.
Counsel for Plaintiff-Appellee
4000 Town Center, Suite 550
Southfield, MI 48075
(248) 351-2200

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REPLY TO CITY'S DISPUTE OF THE JURISDICTIONAL STATEMENT

As to jurisdiction, the City again resorts to a circular argument, predicated on the false major premise that the no fault tort threshold concerns governmental immunity and thus comes within the court rule-created right of appeal under MCR 7.202(6)(a)(v). But whatever the nature of the no fault tort threshold of MCL 500.3135, it is not a function of governmental immunity—were that so, then every defendant denied summary disposition, whether an individual or corporation, would be entitled to an interlocutory appeal as of right.

The City in effect asserts the Legislature should have amended MCL 600.308 if it did not approve of MCR 7.202(6)(a)(v). The idea that the Legislature must act to prevent the judiciary from usurping its exclusive prerogatives is anathema and has been firmly and repeatedly rejected by this Court. *McCahan v Brennan*, 492 Mich 730, 749-750; 822 NW2d 747 (2012); *McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999).

STATEMENT OF QUESTIONS PRESENTED

Issue I: Where negligent operation of a municipally-owned motor vehicle results in bodily injury, are non-economic damages for pain and suffering, mental and emotional distress, etc. recoverable under MCL 691.1405 as "bodily injury"?

Plaintiff-appellant answers "yes".
The circuit court answered "yes".
The Court of Appeals answered "no".
The City of Flint answers "no".

Issue II: Where, as a result of a city employee's negligent operation of a municipally-owned motor vehicle a collision causes plaintiff to suffer a herniated disc and related physical injuries, in consequence of which plaintiff loses his employment, spends several months with a medically-imposed 5-pound lifting restriction, is unable to perform his usual household and parental duties, including running errands, driving himself and his son to activities, shopping, mowing the lawn, raking leaves, laundry, cooking, and cleaning, and is compelled to cease his accustomed recreational activities,

A. Did the Court of Appeals lack jurisdiction, on the municipality's claim of appeal from an interlocutory order denying summary disposition *inter alia* on grounds of governmental immunity, to review the merits of summary disposition *vis à vis* the no fault insurance act's threshold for tort liability, MCL 500.3135(1), and

B. Even if the Court of Appeals had proper jurisdiction to review the merits, do plaintiff's injuries, viewed in a light most favorable to him as the non-moving party, create *at least* a material question of fact in relation to the no fault insurance act's threshold for tort liability, MCL 500.3135(1), such that denial of summary disposition was entirely correct?

Plaintiff-appellant answers "yes" and "yes".
The circuit court answered "yes" to Part B and had no occasion to address Part A.
The Court of Appeals answered "no" and "maybe".
The City of Flint answers "no" and "no".

REPLY TO CITY OF FLINT'S COUNTERSTATEMENT OF FACTS

The City contends appellant's Statement of Facts violates MCR 7.212(C)(6), but identifies no specific offending portion. The City then declines to "belabor this point"—read "excuses itself from identifying any error or omission per MCR 7.212(D)(3)(b)"—on the assumption that viewing the facts in a light most favorable to the non-moving party in the summary disposition context "will have no bearing on this Court's decision." No reason for this Court to overrule or abandon such long-standing principles, evoked in *Dubuc v El-Magrabi*, 489 Mich 869; 795 NW2d 593 (2011) and *In re Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008), is identified by the City. Appellant assumes this Court will adhere to these principles.

REPLY TO COUNTERSTATEMENT OF THE STANDARD OF REVIEW

The City chooses to proffer a (disguised) counterstatement that ignores the duty to view the facts in a light most favorable to the plaintiff, and otherwise omits pertinent limitations and restrictions on the situations in which summary disposition may be granted. Plaintiff's original summary of the proper review standard was and remains entirely correct; indeed, the City has shown its inability to identify any error, omission or deficiency in plaintiff's formulation, making the presentation of a counterstatement improper. MCR 7.212(D)(3)(a).

REPLY TO CITY OF FLINT'S ARGUMENT

Issue I: Where negligent operation of a municipally-owned motor vehicle results in bodily injury, non-economic damages for pain and suffering, mental and emotional distress, etc. are recoverable under MCL 691.1405.

In his brief on appeal, appellant demonstrated that any notion exceptions to governmental immunity "must be narrowly construed" is without sound basis in Michigan jurisprudence or the accepted principles of statutory construction. Ignoring that argument, the City—in what seems to be the "preargument argument" section of its brief, simply cites the expected boilerplate,

relying on *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000).

But the City then adds a kind of policy argument—"This Court has recognized that this strict reading of the GTLA is necessary to prevent a drain on governmental agencies' resources." However, no such policy can be identified either in the words of the statute, or even in its title; so in reality, the City asks this Court to put a gloss on the GTLA based on a "public policy" argument the Legislature did not choose to include within the enactment. This the Court, by its own principles, cannot and must not do. As held in *Smitter v Thornapple Twp*, 494 Mich 121, 140; 833 NW2d 875 (2013):

> However, the public policy of Michigan is not to be determined by what a majority of this Court deems desirable or appropriate at a given time. Rather, the public policy of Michigan must be "clearly rooted in the law" as "reflected in our state and federal constitutions, our statutes, and the common law."[FN47] Moreover, this Court may not substitute its policy preferences for those policy decisions that have been clearly provided by statute.[FN48]
>
> [FN47] *Terrien v Zwit*, 467 Mich 56, 66–67; 648 NW2d 602 (2002).
> [FN48] See generally *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 588–593; 702 NW2d 539 (2005).

In fact, but for the GTLA itself, public policy is Michigan, as represented by the common law, is that governmental immunity should be abolished. *Sherbutte v City of Marine City*, 374 Mich 48, 52-54; 130 NW2d 920 (1964); *Williams v City of Detroit*, 364 Mich 231; 111 NW2d 1 (1961); *Wardlow v City of Detroit*, 364 Mich 291; 111 NW2d 44 (1961). And the reason for common-law abolition of immunity was summarized in *Williams*, 364 Mich at 265—" 'the application of the rule is more harmful than helpful and results in more injustice than it prevents.' " Indeed, in *Williams*, 258-259, this Court rejected exactly the spurious policy argument now resurrected by the City from the hoary slime encrusted by 50 years of sepulture:

> If we examine the practical arguments advanced against change of this rule, we find, if anything, even less substance. Each brief speaks of the crushing weight of negligence

awards which might bankrupt a small governmental unit. Most of the briefs filed to support appellee city avoid mention of public liability insurance as if it were a new and barely tried invention of which the courts could not possibly have knowledge.

No such scheme for prepaying and sharing risk did exist in any common form at the time when the courts of this country adopted the doctrine of governmental immunity. The probabilities are strong that this fact, and the possibility of a crushing liability falling upon a small governmental unit, had as much to do with adoption of the rule as did stare decisis and the fact that Kings had no inclination to be liable in damage to their subjects.

In 1961, however, liability insurance is no new and untried device. We take judicial notice that it serves private citizens and private corporations as a means of prepaying and sharing just the sort of unexpected burden with which we deal in this case.

This Court has just heard and rejected this same practical argument in relation to hospitals in this State. *Parker v Port Huron Hospital*, 361 Mich 1; 105 NW2d 1. Many of the smaller Michigan hospitals, absent liability insurance, would, of course, be much harder pressed by abolition of charitable immunity than any governmental unit in Michigan will be by this decision. In abolishing the doctrine of charitable immunity, this Court not only took judicial notice of the change of circumstance represented by the availability of public liability insurance, but also made the decision prospective * * * in order to give notice of the change and enable the hospitals to protect themselves in advance.

* * * We do not ignore the fact that this decision cast in this form will, of course, occasion some minor increase in the tax burden due to purchase of insurance. It would also serve to assure each taxpayer that if by chance a catastrophe befell him as a result of an ordinary tort committed by a public employee, the economic impact thereof would be shared with all other insureds, rather than falling with awesome tragedy upon the innocent victim alone.

Footnote 18 in *Mack v City of Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002), which was a bit of both *ipse dixit* and *obiter dictum*, with no supporting reasoning or citation to authority, cannot erase the holding in *Williams*, or justify easing pressure on municipal budgets at the expense of treating tort victims with callous unfairness and thus forcing unlucky individuals to bear disproportionately the burdens society should apportion among the entire citizenry[1].

Turning attention to the specific problem at hand—the meaning of "liability for bodily

[1] The City mistakenly claims that abolition of governmental immunity in *Williams* was "promptly" overruled by the GTLA, but in fact the Legislature did not get around to doing so *effectively* until late 1970. *Pittman v City of Taylor*, 398 Mich 41, 46; 247 NW2d 512 (1976).

injury" in MCL 691.1405, the City bizarrely cites *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001) for the proposition that "medical expenses and pain and suffering are distinct categories of damages." How that helps define "bodily injury" is a puzzlement.

The City next proceeds to completely misread and then misrepresent appellant's argument, claiming appellant argues for liability under the no fault act. What appellant did was note that the no fault act also uses the term "liability for bodily injury" and treats the term expansively in terms of recoverable damages; appellant did NOT claim that the no fault act itself has any effect, one way or another, on government liability *vel non* under MCL 691.1405.

Finally reaching the "post-preargument" section of its brief, the City again resorts to mischaracterizing appellant's argument, positing that "Appellant claims that government immunity should *in fact* be narrowly construed and its exceptions broadly construed." Not at all; appellant claims immunity should *in law* be narrowly construed as in derogation of common law, and exceptions construed as statutes in furtherance of Michigan common law[2].

Having thrown itself *soi-disant* into pooh-poohing appellant's "fifteen page attempt to overturn the long-established precedent reiterated by *Ross* as well as his ten page historical overview of the interpretation of 'bodily injury' ", the City simply falls back on quoting a snippet from *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 596; 363 NW2d 641 (1984) that merely bespeaks the usual effort by the Justices of this Court to achieve a correct decision, but nowhere acknowledging that the statute before them is in derogation of common law and thus must be strictly construed.

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[2] While appellant appreciates the City's adjectival lexicon—"pithy", "grandiose", "momentous"; the City, however, fails to appreciate that to grant leave in this case and accord plenary consideration is, of itself, momentous, a recognition that the issue framed by the grant is, in turn, momentous. Logorrhea is not logodædaly.

The City then quotes *Ross'* discussion of *sovereign* immunity, *id.* at 598—prelude to its own lengthy exploration of *sovereign* immunity—a concept which has ABSOLUTELY NOTHING WHATEVER TO DO WITH THIS CASE involving a city. *Myers v Genesee Co Auditor*, 375 Mich 1, 6-9; 133 NW2d 190 (1965); *Pittman v City of Taylor*, 398 Mich 41, 47; 247 NW2d 512 (1976) (separately abolishing *sovereign* immunity *after* passage of the GTLA). Indeed, *Williams,* 364 Mich at 258 noted that while *sovereign* immunity remained intact after 900 years of common law, the English judiciary long ago abolished *governmental* immunity:

> It is a fascinating quirk of legal history that England, the land which gave this doctrine birth, has retained a vestigial monarchy; but English courts have for generations allowed tort actions against municipalities and school districts. *Lyme Regis v Henley* (1834), 2 Clark & F 331 (6 Eng Rep 1180, 1 Eng Rul Case 601); *Shrimpton v Hertfordshire County Council* (1911), 104 Law Times Rep 145 (2 NCCA 238); *Ching v Surrey County Council*, [1910] 1 KB 736 (2 NCCA 229); *Morris v Carnarvon County Council*, [1910] 1 KB 840 (2 NCCA 234); *Smith v Martin and the Corporation of Kingston-Upon-Hull*, [1911] 2 KB 775 (2 NCCA 215).

After quoting Oliver Wendell Holmes—" 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'"—*Williams* added, "The rule of governmental immunity has as legal defense only the argument that age has lent weight to the unjust whim of long-dead Kings. It is hard to say why the courts of America have adhered to this relic of absolutism so long a time after America overthrew monarchy itself!" Yet here is the City, muttering desuetudinous incantations in an effort to revivify Frankenstein's unholy corpse.

Next, the City contends that the decisions of this Court positing the "broad immunity-narrow exception" mantra should be augmented by citing Court of Appeals' decision to like effect. But, of course, the Court of Appeals was duty bound to parrot what it perceived as the directions of its superiors, and so those citations add nothing weighty to the discussion or analysis. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Meanwhile, the City has not even attempted to point to any part of *Ross* that analyzes the "broad-narrow"

dichotomy and explains with ineluctable judicial reasoning why that is the proper construction. As noted in appellant's brief (p. 15) and entirely unchallenged by the City, *Ross* only held that "governmental function" should be interpreted in a broad manner. But "governmental function" is not at issue in the present case—no one disputes that David Sisco was engaged in his governmental duties when he negligently drove his city-owned vehicle across the center line, in violation of MCL 257.642(a), and collided with Harold Hunter's vehicle lawfully traveling in its proper lane and direction. The only issue concerns whether Mr. Hunter's damages, including emotional and mental problems arising from his resulting back injury, are within liability for "bodily injury". *Ross* provides neither insight nor analysis, nor anything helpful in that regard.

Again, appellant does not dispute that "bodily injury" generally means corporeal hurt; Harold Hunter has multiple, serious corporeal injuries—a herniated disc at L4-5, epidural lipomatosis surrounding the thecal sac at L5 and S1 level, and bilateral L5 radiculopathy. Plaintiff thus more than satisfies the definition of "bodily injury" in *Wesche v Mecosta Co Rd Comm'n*, 480 Mich 75, 84-85; 746 NW2d 847 (2008). But plaintiff disputes that "liability for bodily injury" in MCL 691.1405 is limited to only corporeal *damages*; where corporeal injury results in pain and suffering (as it almost always will, except in rare individuals with disfunctional neurological systems), and/or mental and emotional damages, those are all within the scope of "liability for bodily injury", as plaintiff's brief on appeal demonstrates. For the City to merely say "*Wesche*" in response is to concede that it has nothing beyond *Wesche*'s discussion of a consortium claim—involving no physical injury to the claimant—to support its position.

The City next takes issue with plaintiff's reliance on cases in which "bodily injury" liability was held to encompass all consequential damages, including pain and suffering and mental and emotional damages, on grounds they did not involve any question of governmental

immunity. Indeed, that is the whole point; *Wesche* wrongly treated "liability for bodily injury" as used in MCL 691.1405 as an ordinary phrase that could be understood by resort to a common dictionary, but in truth it is a legal term of art in the present context that must be understood (no statutory definition being supplied) as the common law interpreted it. MCL 8.3a.

The City further objects, however, that in discussing that tort liability involving bodily injury includes all related consequential damages, specifically embracing pain and suffering and mental and emotional suffering, plaintiff's citations do not all specifically address the meaning of "bodily injury" as a term of art. The City thus purports to distinguish *Sherwood v Chicago & W M Ry Co*, 82 Mich 374, 383-384; 46 NW 773 (1890) and *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 249-252; 531 NW2d 144 (1995) (ignoring the plethora of other authorities cited in plaintiff's brief on appeal) on grounds the term "bodily injury" does not there appear. But this facile argument reflects the City's failure to understand that, with rare exceptions, mental or emotional injuries by themselves are not compensable. As explained in *Daley v LaCroix*, 384 Mich 4, 8; 179 NW2d 390 (1970) (boldfaced emphasis added):

> Recovery for mental disturbance caused by defendant's negligence, but without accompanying physical injury or physical consequences or any independent basis for tort liability, has been generally denied with the notable exception of the Sui generis cases involving telegraphic companies and negligent mishandling of corpses. See 23 ALR 361; 64 ALR2d 100, §7; see, also 2 Restatement, Torts (Second), §436A; 1 Cooley, Torts (4th ed) pp. 95-102.
>
> On the other hand the law had always permitted recovery in closely analogous situations notwithstanding the fact that plaintiff's mental or emotional reactions were a necessary element in the chain of causation. See 38 Am Jur, Negligence, §§78-80, pp. 737-739. **Also, compensation for a purely mental component of damages where defendant negligently inflicts an Immediate physical injury has always been awarded as 'parasitic damages.'** See 1 Street, Foundations of Legal Liability, 461; 1 Cooley, Torts (4th ed.), p. 107; 2 Harper & James, Torts, §18.4, p. 1032; Prosser, *supra*, at p. 349. See, also, 22 Am Jur 2d, Damages, §195 *et seq.*, discussed *infra*.

So cases like *Sherwood* and *Phillips*, when discussing how mental and emotional damages or

pain and suffering are recoverable in an ordinary negligence case, do so with the understanding that they have a baseline "bodily injury", or else the entire discussion would be unnecessary. Thus, such cases do, indeed, directly implicate what "liability for bodily injury" means to those learned in the law.

The City then turns to comparing 1945 PA 87—which, once again, dealt only with the *sovereign* immunity of the state, not the *governmental* immunity of municipalities—and tries to extract from this statute on another topic some comparisons with the phrasing of MCL 691.1405. What we can learn from, say, 1945 PA 127, abrogating both governmental and sovereign immunity "based on the negligent operation of a motor vehicle owned by such defendant", is that, a quarter-century before MCL 691.1405, the Legislature recognized that immunity relating to motor vehicle negligence was unfair and impolitic. That hardly justifies an artificially narrow construction of MCL 691.1405, or a correspondingly artificially broad reading of MCL 691.1407, without finding some statutory directive to treat different portions of the GTLA as though some were handed down from Mt. Sinai and others were found in a dumpster.

Similarly, and with equal xylocephaly, the City quotes the Court of Appeals' opinion below, referencing the definition of "bodily injury" in Black's Law Dictionary (9th ed)—but without attempting to dispute what plaintiff argued in his brief on appeal, pp. 32-33, footnote 15:

> [15] While the Court of Appeals did cite Black's Law Dictionary, the definition therein is short and supported by scant authority, with no attention given to the subsidiary topic of damages. The short-sighted focus on a threshold requirement of physical harm simply fails to address whether consequent emotional or mental damages come within the ambit of *liability* for "bodily injury", which is what MCL 691.1405 provides. Relying on Black's is like accepting the answer to a question other than the one of particular interest—see *Estate of Johnson v Kowalski*, 495 Mich 982; 843 NW2d 922 (2014); it does nothing to aid the analysis.

The City's argument is essentially circular. The City assumes that the statutory phrase "bodily injury and property damage" excludes pain and suffering or mental injuries which flow from a physical injury, and then concludes the statute should be construed according to that assumption.

The City simply refuses to come to grips with the well-established jurisprudential principle that mental or emotional injuries which are a consequence of physical injury come within the rubric of "bodily injury" as an item of damages. *Hannay v MDOT*, 299 Mich App 261, 269-270; 829 NW2d 883 (2013); *Sherwood, supra*; *Greenawalt v Nyhuis*, 335 Mich 76, 87; 55 NW2d 736 (1952); *Beath v Rapid R Co*, 119 Mich 512, 517-518; 78 NW 537 (1899).

The City purports to distinguish *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 59-60; 760 NW2d 811 (2008), using sophistry previously exposed (plaintiff's brief, pp. 35-36).

On the other hand, the City agrees with *Hannay v MDOT*, 299 Mich App 261, 268-269; 829 NW2d 883 ((2013) as making "sense given the purpose behind the broad construction of governmental immunity." But the City then segues into an unsupported, and insupportable, proposition: "The significance of *Wesche* and its progeny * * * is that plaintiffs cannot collect hugely speculative pain and suffering awards from the government once they meet the threshold." The City fails to explain why pain and suffering awards are "speculative"; inasmuch as speculative damages are flatly prohibited in all contexts, *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966), whereas pain and suffering has long been fully compensable--this Court expressly rejecting the notion such damages are "speculative" merely because intangible, *Berger v Weber*, 411 Mich 1, 16; 303 NW2d 424 (1981)[3]—this insult to Michigan jurors and judges

[3] "We are not convinced that the injury to the child is too speculative to award damages. Courts, law review commentators and treatise writers all recognize that the child suffers a genuine loss. While the loss of society and companionship is an [***footnote 3 continues on next page***]

cannot be countenanced.

As the concluding portion of its brief reveals, the City is engaged in an attempt to judicially rewrite MCL 691.1405 so it permits recovery of only economic damages, see MCL 600.1483(3). The Legislature, however, did nothing of the sort, although it had available a ready matrix for establishing a table of specific losses, MCL 418.361(2)(a)-(*l*). Nor did the Legislature impose a ceiling on recoverable damages, notwithstanding it knows precisely how to do so. MCL 600.1483(1). And this Court, in the unlikely event it were so disposed, may not accept the City's invitation to usurp the legislative function. Const 1963, art 3, §2, art 4, §1.

Finally, a jury can—and must—properly determine questions of fact relating to immunity. Const 1963, art 1, §14; *Gillam v Lloyd*, 172 Mich App 563, 577; 432 NW2d 356 (1988); *Byrd v Blue Ridge Co-op*, 356 US 525, 537 ff; 78 S Ct 893; 2 L Ed 2d 953 (1958).

RELIEF REQUESTED

For the foregoing reasons, the trial court ruled appropriately and correctly, reaching the only possible legal conclusion as to each issue, and its decision denying summary disposition should be affirmed. The decision of the Court of Appeals must be correspondingly reversed.

Respectfully submitted,

Allan Falk (P13278)
Allan Falk, P.C.
Appellate counsel for Plaintiff-Appellee
2010 Cimarron Dr.
Okemos, MI 48864-3908
(517) 381-8449

Cyril V. Weiner (P26914)
Nicholas M. Marchenia (P73169)
Law Office of Cy Weiner, P.C.
Counsel for Plaintiff-Appellee
4000 Town Center, Suite 550
Southfield, MI 48075
(248) 351-2200

[***footnote 3 continued from previous page***] intangible loss, juries often are required to calculate damages for intangible loss. Awards are made for pain and suffering, loss of society and companionship in wrongful death actions, and for loss of spousal consortium. Evaluating the child's damages is no more speculative than evaluating these other types of intangible losses."